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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GARRY A. BAILEY et al.,

Plaintiffs and Respondents,

v.

CHARLES EVERETTE ROSE,

Defendant,

DAMIANI LAW GROUP, APC et al.,

Third Party Claimants and
Appellants.

H044788

(Santa Clara County

Super. Ct. No. 2010-1-CV-179515)

This appeal involves three competing claims to a deposit account held by a judgment debtor's wife. Plaintiffs filed a judgment lien against the debtor's personal property interests, and through a later execution lien levied the wife's account. The debtor's lawyer in the underlying case claimed a superior right to the wife's account through a perfected security interest, and the wife claimed her account was beyond the reach of both creditors. The trial court ordered the funds released to plaintiffs, finding plaintiffs' judgment lien attached to the account and took priority over the lawyer's security interest. For the reasons stated here, we will affirm the order.

I. BACKGROUND

Plaintiffs and class representatives Garry and Brooke Bailey sued Charles Everett Rose and others for operating a scheme to collect advance fees for purported loan

modification services. Plaintiffs won a multi-million-dollar default judgment in December 2013, which this court affirmed. (*Bailey v. Rose* (H040711, Jan. 13, 2016) [nonpub. opn.].)

In February 2015, plaintiffs filed a Notice of Judgment Lien against Charles¹ with the California Secretary of State. Charles appeared for a debtor's examination in October 2016, and the following month plaintiffs served a levy under a writ of execution on JP Morgan Chase Bank, with the San Diego County Sheriff acting as levying officer. Plaintiffs' levy revealed a deposit account in the name of Charles's wife, Amber Rose, with a balance of \$43,736, and created an execution lien on the account under Code of Civil Procedure section 697.710. Charles's former legal counsel, Damiani Law Group, served a notice with the levying officer claiming a superior right to the deposit account based on a security interest purportedly created in December 2013.

Plaintiffs petitioned as judgment creditors to the trial court to adjudicate Damiani's third-party claim. Damiani argued that it had perfected a security interest in the account through its December 2013 UCC-1 filing despite Charles's name being entered incorrectly on the financing statement, which was not corrected until November 2015. Damiani argued its security interest attached to the deposited funds because they are "identifiable proceeds of original collateral" securing the retainer agreement between Charles and Damiani. Amber sought an order under Family Code section 911 shielding the deposit account from Charles's creditors based on her status as the spouse of a judgment debtor.² The trial court issued a notice two days before the

¹ For ease of reference and intending no disrespect, we will refer to the Roses by their first names.

² Family Code section 911, subdivision (a) provides: "The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate[.]"

scheduled hearing “confirm[ing]” that Amber’s claim of exemption was improperly filed and was therefore not on the hearing calendar. (Amber’s claim had not been timely filed with the levying officer as required by Code of Civil Procedure section 703.520).

After hearing argument from the parties and allowing input from Amber’s attorney, the trial court ruled that Family Code section 911 did not protect the deposit account from the judgment lien because some causes of action underlying the judgment were statutory; thus, Charles did not incur the resulting debt until entry of the judgment in December 2013, which was after his July 2013 marriage to Amber. The court ruled that the judgment lien attached to the deposit account under Code of Civil Procedure section 697.530, subdivision (a)(1) as proceeds from the accounts receivable of Amber’s business. The lien filed in February 2015 took priority over Damiani’s security interest, which was not perfected until Damiani amended its faulty financing statement in November 2015. Damiani and Amber have both appealed.

II. DISCUSSION

Damiani contends the debt reflected in plaintiffs’ judgment was incurred by Charles before he married Amber in July 2013. According to Damiani, Amber’s deposit account is *not* liable for that debt by operation of Family Code section 911, but it *is* subject to Damiani’s security interest in community property assets pledged as collateral in the December 2013 agreement securing Charles’ payment of Damiani’s fees. Damiani argues that the judgment lien does not attach to the deposited funds for the additional reason that the funds are not proceeds from an interest in personal property subject to a judgment lien under Code of Civil Procedure section 697.530. Even if the deposit account is subject to the judgment lien, Damiani alternatively argues that its security interest was perfected when Charles signed the agreement in December 2013 (not November 2015 when the UCC-1 was corrected), which would give it priority over the February 2015 judgment lien.

A. STANDARDS OF REVIEW

This appeal requires us to determine whether the trial court correctly applied the Family Code, the Code of Civil Procedure, and the California Uniform Commercial Code to resolve the competing claims to the deposit account. We review those questions under the de novo standard of review. (See *In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 684–687; *Cassel v. Kolb* (1999) 72 Cal.App.4th 568, 573; *Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, 83.) Where the trial court made factual determinations, we defer to those determinations supported by substantial evidence. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

B. FAMILY CODE SECTION 911 DOES NOT SHIELD THE DEPOSIT ACCOUNT FROM THE JUDGMENT LIEN

For debts incurred before marriage, the earnings of a non-debtor spouse during the marriage are protected from the debtor spouse’s creditors, provided the earnings are held in a deposit account from which the debtor spouse has no right to withdraw and the earnings are not comingled with other types of community property. (Fam. Code, § 911, subd. (a).) The date on which a debt is incurred depends on the nature of the obligation. A contractual debt is incurred at the time the contract is made; a debt arising from a tort is incurred at the time the tort occurs; and all other debts are incurred “at the time the obligation arises.” (Fam. Code, § 903.)

Damiani seeks to prevent plaintiffs’ judgment lien from reaching the deposit account, thereby giving priority to the security interest it perfected in November 2015. Damiani argues that the trial court erred by finding Charles’s debt to plaintiffs arose during the marriage at the time the judgment was entered, rather than before marriage when the underlying conduct occurred.

Damiani asserts that the timing of a debt under Family Code section 903 is determined by the nature of the complaint giving rise to the judgment, and that here the gravamen of plaintiffs’ complaint is fraud and breach of contract. Gravamen has been

defined as “ ‘[t]he material part of a grievance, charge, etc.’ ” (*Williams v. Pacific Greyhound Lines* (1944) 67 Cal.App.2d 250, 252), and courts have looked to whether the gravamen of a cause of action is dependent upon tort or breach of contract to determine venue, the applicable limitations period, the right to contribution, and whether an illegal contract bars a damages claim. (*Id.* at p. 253 [cited cases].) Damiani also argues that the gravamen of a *complaint* is determined by “the primary right” alleged to have been violated and not by the remedy sought. Damiani is partly correct. “ ‘The gravamen, or essential nature ... of a *cause of action* is determined by the primary right alleged to be violated, not by the remedy sought.’ ” (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 820–821, *italics added*.) Primary right is a theory of code pleading providing that “a ‘ “cause of action” ’ is comprised of a ‘ “primary right” ’ of the plaintiff, a corresponding ‘ “primary duty” ’ of the defendant, and a wrongful act by the defendant constituting a breach of that duty.” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) The primary right is the plaintiff’s right to be free from the particular injury suffered, the violation of which gives rise to a single cause of action. (*Ibid.*)

Plaintiffs, on the other hand, urge us to examine the individual causes of action rather than the complaint generally. They argue that the fourth and fifth causes of action are statutory and based neither in contract nor tort. Judgment was entered separately on each cause of action, and the liability on either cause of action far exceeds the \$43,736 balance in the deposit account.

Plaintiffs’ fourth cause of action—violation of Business and Professions Code sections 6150 to 6156 (unlawful solicitation)—is not premised on tortious conduct or breach of a contractual obligation. The fourth cause of action alleged Charles “acted as [a] capper[] within the meaning of Business and Professions Code section 6151, in that [he] acted for consideration as [an] agent[] for an attorney at law or law firm in the solicitation or procurement of business for the attorney at law or law firm.” The conduct was proscribed by the Legislature in the 1930s to address “scandalous” and “notorious”

conditions “arising out of ‘ambulance chasing’ activities of lawyers, insurance adjusters, and claim agents.” (*Hutchins v. Municipal Court* (1976) 61 Cal.App.3d 77, 85.) The gravamen of the fourth cause of action is the statutorily proscribed conduct, which is not tantamount to a tort. Indeed, to state a cause of action for unlawful solicitation “one need not plead and prove the elements of a tort.” (*Ruben v. Green* (1993) 4 Cal.4th 1187, 1200; see also *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1247 [“attorney solicitation may not be the basis for tort liability”].) The primary right giving rise to the fourth cause of action is the right to be free from unlawful attorney solicitation, not the right to be free from the other conduct underlying the class action lawsuit.

Nor is the fourth cause of action based on a contractual obligation. A violation of Business and Professions Code section 6150 et seq. does not require the existence or breach of a contract. To the extent any contracts were formed in this case, they were void as a matter of law. (Bus. & Prof. Code, § 6154, subd. (a) [“Any contract for professional services secured by any attorney at law or law firm in this state through the services of a runner or capper is void”].) And Charles was not even a party to a contract; any contracts were between plaintiffs and the Haffar law firm. Charles therefore never acquired contractual rights and was never obligated to perform under any contract. (*In re Marriage of Nassimi, supra*, 3 Cal.App.5th at p. 686 [contract is “made” under Family Code section 903 when a contractual obligation is incurred].)

Damiani argues for the first time in its reply brief that the judgment on the fourth cause of action is void as a matter of law because solicitation as a capper is a crime which can only be prosecuted by the government, and there is no private right of action. (Bus. & Prof. Code, §§ 6152, 6155.) Damiani has not shown good cause why the issue was not raised in the opening brief. The issue thus is not properly before this court. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322) But even if we were to consider the issue, Damiani’s argument is undercut by its own authorities. *Rubin v. Green* upheld the

dismissal of a civil lawsuit under Civil Code section 47 (litigation privilege) which included a claim for unfair business practices under Business and Professions Code sections 6152 and 6153. (*Rubin v. Green, supra*, 4 Cal.4th 1187, 1192–1193, 1200.) In rejecting the plaintiff’s strategy to override the litigation privilege in that case by pleading the unlawful solicitation claim under the unfair competition statute, the Supreme Court explained that “members of the public who, unlike plaintiff, are not adversaries in collateral litigation involving the same attorneys also have standing to pursue unfair competition claims under the statute,” citing Business and Professions Code section 17204, which authorizes actions brought by any “person who has suffered injury in fact and has lost money or property as a result of the unfair competition.” (*Rubin*, at p. 1204.)

Charles’s liability under the fourth cause of action is therefore not a debt incurred “in the case of” a contract or tort under Family Code section 903, subdivisions (a) and (b). The debt was “incurred” at the time of the obligation under Family Code section 903, subdivision (c). Charles’s obligation under the fourth cause of action arose when judgment was entered in December 2013, during his marriage to Amber. Accordingly, Family Code section 911, which could protect Amber’s earnings from Charles’s pre-marital debt, does not apply here. Because we conclude that by virtue of the fourth cause of action Charles’s debt was incurred during his marriage to Amber, we need not decide whether contract or tort obligations arose from the other causes of action, nor whether a third-party claimant such as Damiani who is not the debtor’s spouse may claim the spousal earnings exception under Family Code section 911 for its own benefit.

C. PLAINTIFFS’ JUDGMENT LIEN REACHES THE DEPOSIT ACCOUNT

A judgment lien attaches to all interests in certain personal property at the time the lien is created as well as to any later-acquired eligible interests, and it continues to attach to an eligible property’s identifiable cash proceeds. (Code. Civ. Proc., §§ 697.530, subds. (a)(1), (b); 697.620, subds. (a)(2), (b).) A judgment lien does not attach to a

deposit account, but it does attach to accounts receivable (Code Civ. Proc., § 697.530, subd. (a)(1)–(6)), which are rights to “payment of a monetary obligation, whether or not earned by performance,” including “for services rendered or to be rendered.” (Cal. U. Comm. Code, § 9102, subd. (a)(2); Code Civ. Proc., § 680.130.)

Damiani contends the trial court erred by concluding plaintiffs’ judgment lien attached to the deposit account as proceeds from accounts receivable paid to Amber’s company (Amber Rose Holdings). As we understand the argument, the funds should be considered Amber’s earnings during marriage (shielded from a premarital judgment lien by Family Code section 911), rather than the proceeds of her company’s accounts receivable (to which a post-marriage judgment lien could attach).

Substantial evidence in the record supports the trial court’s characterization of the funds as traceable revenue from Amber’s company. Even if the funds also come within the definition of earnings under Family Code section 911, subdivision (b)(2) (“ ‘Earnings’ means compensation for personal services performed, whether as an employee or otherwise”), they would still be “accounts receivable” and subject to the judgment lien. Amber declared: “I started my business, Amber Rose Holdings, about two (2) years ago in 2014. I provide social media services and consulting for clients. [¶] I did not begin turning a profit until sometime last year in 2015. I am paid under The Real Market Investors[,] Inc. as a profit share for the revenue that I bring in.” To become a profitable business, Amber Rose Holdings must have generated revenue from the services offered to clients, which was realized from accounts receivable (the right to payment for those services). The declaration also connects the accounts receivable to the deposit account: Amber stated that she received a portion of the revenue generated for clients (a profit share) and that she held those funds in her deposit account. Damiani argues if the funds were proceeds from accounts receivable, those accounts receivable would belong to The Real Market Investors, not Amber’s company. It is unclear whether The Real Market Investors is a client or a payment service, but its function is not

relevant. In either case, the funds in the deposit account were adequately traced to Amber Rose Holdings' accounts receivable to support the trial court's determination.

D. DAMIANI'S ORIGINAL UCC-1 FILING DOES NOT TAKE PRIORITY

A security interest in personal property is perfected by filing a financing statement with the Secretary of State. (Cal. U. Com. Code, § 9310, subd. (a); 9501, subd. (a)(2).) A financing statement must provide the debtor's name, the filer's name, and the collateral covered. (*Id.*, at § 9502, subd. (a).) A financing statement containing minor errors or omissions is effective "unless the errors or omissions make the financing statement seriously misleading." (*Id.*, at § 9506, subd. (a).) A financing statement providing an incorrect debtor's name is not "seriously misleading" so long as a standard search of the records of the filing office using the debtor's correct name discloses the financing statement. (*Id.*, at § 9506, subds. (b)–(c).)

The trial court ruled that Damiani's security interest was not perfected by its December 2013 UCC-1 filing because Charles was named incorrectly on the financing statement and the error was seriously misleading. The December 2013 financing statement identified the debtor as [last name] Charles, [first name] Everett, [middle name] Rose. Damiani argues the name transposition was not seriously misleading because the correct last name was listed, albeit in the wrong field, and a search of the Secretary of State's database in December 2016 (after Damiani had filed a corrected financing statement) retrieved both the original and amended filings. But the relevant inquiry is whether Damiani's financing statement was retrievable before plaintiffs filed their judgment lien in February 2015, not after the amended financing statement was filed. (*In re Softalk Pub. Co.* (9th Cir. 1988) 856 F.2d 1328, 1330 [the purpose of a financing statement is to give notice to others].) Secretary of State regulations caution that "[h]uman judgment does not play a role in determining the results of [a security interest] search." (Cal. Code Regs., tit 2, § 22601.4.) The Secretary of State's standard search

logic uses designated name fields and will retrieve a surname only by exact match. (*Id.*, subds. (g)–(h).) A search at the time plaintiffs’ judgment lien was filed did not return the original financing statement. Therefore, the original filing was seriously misleading and remained so until the error was corrected in November 2015, after plaintiffs filed their judgment lien.

Given our conclusion that the judgment lien takes priority over Damiani’s security interest, it is unnecessary for us to address the parties’ dispute as to the scope and reach of the security interest.

E. AMBER ROSE’S CROSS-APPEAL

Assuming Amber has standing to appeal despite not being a party of record (see *In re FairWageLaw* (2009) 176 Cal.App.4th 279, 285 [an aggrieved party’s interest must be immediate, pecuniary and substantial]), we are not persuaded by her arguments regarding the scope of plaintiffs’ judgment lien. Her argument about how to characterize Charles’s obligation from the fourth cause of action parallels that of Damiani, which we have previously discussed and rejected. We need not reach her challenge to Damiani’s security interest in light of our conclusion that the security interest does not prevail over the judgment lien.

To the extent Amber opposes the characterization of her business and its revenues as community property, the argument lacks merit. Relying on Amber’s declaration, her attorney argued to the trial court that the funds in the deposit account were not community property because Charles was not a signatory on the account and the funds were not comingled. The trial court rejected that argument based on Family Code section 24760 which states that all property acquired by a married person during marriage is community property. It noted that Amber Rose Holdings began to realize profits in 2015 (during the marriage), so the resulting funds deposited into the levied account were community property. Amber’s declaration establishes that her company profits are

community property, and the company itself is also presumed to be community property. (*In re Marriage of Sivyver-Foley & Foley* (2010) 189 Cal.App.4th 521, 526.) But even if the business were separate property (of which there is no evidence) and not reachable by Charles's creditors, its revenues during marriage would still be community property and subject to the execution lien on the deposit account. (*Id.* at p. 525 ["A spouse's time, skill, and labor are community assets and his or her earnings during marriage are community property"].)

III. DISPOSITION

The order denying Damiani's third party claim and releasing funds to respondents is affirmed. Costs on appeal are awarded to respondents.

Grover, J.

WE CONCUR:

Greenwood, P. J.

Bamattre-Manoukian, J.